STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN COMMUNITY ACTION AGENCY ASSOCIATION, Appellant, v MICHIGAN PUBLIC SERVICE COMMISSION and MICHIGAN CONSOLIDATED GAS COMPANY, Appellees.	UNPUBLISHED June 19, 2007 No. 263262 MPSC LC No. 00-013902

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Appellant Michigan Community Action Agency Association (MCAAA) appeals as of right from an order of appellee Michigan Public Service Commission (PSC) allowing appellee Michigan Consolidated Gas Company (MichCon) to calculate its natural gas cost recovery (GCR) factors for the applicable period of January 1, 2004 to March 31, 2005. We affirm.

I. Underlying facts and proceedings.

The PSC may, but is not required to, incorporate a GCR clause in the rate schedule or rates of a gas utility. MCL 460.6h(2). A utility is required to file a GCR plan for a twelve-month period, otherwise known as a GCR plan year, not less than three months before the beginning of the twelve-month period specified in the plan. MCL 460.6h(3). This plan, which also includes a description of the major contracts and gas supply arrangements entered into by the utility to obtain gas during the plan year, the utility's evaluation of the reasonableness and prudence of its decisions to obtain gas as described in the plan, and an explanation of the legal and regulatory actions the utility has taken to minimize the cost of gas purchased, must include a request for a specific GCR factor for each month of the plan year. MCL 460.6h(1)(b), (3). In its final order in a GCR review, the PSC must evaluate the reasonableness and prudence of decisions underlying the GCR plan and to approve, reject, or amend the twelve monthly GCR factors requested by the utility in its GCR plan. MCL 460.6h(6).

In the instant case, MichCon submitted an application for approval of its GCR plan and the factors for the fifteen-month period from January 1, 2004 until March 31, 2005.[1] In its initial filing, MichCon sought to implement a maximum base GCR factor of $5.36 per thousand cubic feet of gas (Mcf) and to allow adjustment to a new maximum by using a quarterly contingency factor based on increases in the New York Mercantile Exchange (NYMEX) gas commodity prices. This would result in a new GCR maximum rate when the contingency occurs, i.e., when gas prices increase. The PSC's initial Notice of Hearing to MichCon's customers described both the base factor and that MichCon was proposing to increase that factor based on certain gas commodity prices. MichCon began self-implementing the $5.36 per Mcf GCR factor on January 1, 2004 but did not begin self-implementing the contingency factor adjustment. The PSC's staff (Staff) subsequently filed an alternative proposed contingency factor matrix. Shortly thereafter, MichCon moved pursuant to MCL 460.6h(8) and (9) for the entry of a temporary order approving a maximum GCR factor of $6.15 per Mcf beginning June 1, 2004. This new motion did not request that any temporary order incorporate a NYMEX contingency rate scheme.

MCAAA moved for declaratory relief, challenging the introduction of the new evidence, and requesting that MichCon's motion be noticed as a separate contested case proceeding and set for hearings separate from the initial proceeding. However, on June 3, 2004, the PSC issued a temporary order granting MichCon's request to increase its maximum GCR factor from $5.36 to $6.15 per Mcf. The order also authorized the utility to temporarily implement the Staff's version of the NYMEX contingent factor mechanism. MichCon subsequently filed a notice that it was implementing the contingent factor mechanism beginning in July 2004.

On May 17, 2005, the PSC issued its final order. It found that it was proper to consider MichCon's updated testimony and evidence. It further found that no new contested case hearing was necessary to consider MichCon's request for the $6.15 per Mcf GCR increase, because the initial application was in the midst of discovery and had not yet gone to a hearing, and thus a request to reopen would have been premature. It also agreed with the adoption of the Staff's NYMEX-based contingency factor matrix, along with an electronic filing and notification requirement. The PSC held that two separate overlapping plan periods were the appropriate way to transition from the calendar year model to the operational year model. The PSC then approved MichCon's transitional GCR plan and its 5-year forecast. It further authorized a GCR factor of $5.36 per Mcf for the 2004 calendar year, and a GCR factor for the operational year of April 1, 2004 to March 31, 2005, of $6.15 per Mcf "adjusted due to operation of the contingent tariff contained in [the Staff's proposal]." MCAAA appeals as of right from that order.

II. Authorization under MCL 460.6a.

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[1] The time frame involved in the instant case represents a "transitional" fifteen-month period from January 2004 through March 2005 to coincide with a change from a calendar year to one that runs from April 1st to March 31st. The PSC subsequently determined that, to comply with the various provisions of MCL 460.6h, it would authorize two "overlapping plan years" to cover this fifteen-month period. One period would run during the 2004 calendar year, while the second period would run from April 1, 2004 through March 31, 2005.

Appellant first argues that the PSC's temporary and final orders failed to follow the clear statutory language in MCL 460.6a concerning the notice that must be provided whenever the PSC approves a gas rate increase. MCAAA appears to maintain that the PSC should not have approved MichCon's request for a temporary order for a GCR factor increase from $5.36 to $6.15 per Mcf, because MichCon failed to provide separate notice to its service area of the proposed increase. MCAAA also appears to argue that MichCon's subsequent GCR factor increases,[2] which occurred due to the utilization of the contingency factor matrix, also required separate notice under the statute. MCAAA also contends that the PSC improperly condoned the use of the contingency factor matrix in violation of the prohibition against automatic adjustment mechanisms found in MCL 460.6a(2). We disagree.

Our review of PSC orders is generally narrow:

> The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party allegedly aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. An order is unreasonable if it is arbitrary, capricious, or not totally supported by the evidence.
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> A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record.
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> We defer to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. We give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer, but we may not abandon our responsibility to interpret statutory language and legislative intent. We do not afford the same measure of deference to an agency's initial interpretation of new legislation as we do to a longstanding interpretation. "Whether the PSC exceeded the scope of its authority is a question of law that we review de novo." [*Attorney General v Michigan Pub Service Comm*, 269 Mich App 473, 479-480; 713 NW2d 290 (2005) (citations and quotations omitted).]

MCL 460.6a provides in pertinent part:

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[2] MCAAA maintains that MichCon has used the PSC improper order to self-implement rate increases in June 15, 2005 and September 15, 2005. But these increases, if they occurred, were not before the PSC when it made its decision below. We therefore will review only the June 14, 2004 contingent information filing.

(1) *When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected.* The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. A finding or order shall not be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing. *There shall be no increase in rates based upon changes in cost of fuel or purchased gas unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of fuel or purchased gas.* The rates charged by any utility pursuant to an automatic fuel or purchased gas adjustment clause shall not be altered, changed, or amended unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of the fuel or purchased gas.

(2) The commission shall adopt rules and procedures for the filing, investigation, and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to petitions or applications within a period of 9 months from the filing of the petitions or applications. *The commission shall not authorize or approve adjustment clauses that operate without notice and an opportunity for a full and complete hearing, and all such clauses shall be abolished.* The commission may hold a full and complete hearing to determine the cost of fuel, purchased gas, or purchased power separately from a full and complete hearing on general rate case and may be held concurrently with the general rate case. The commission shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent. As used in this section:

(a) *"Full and complete hearing" means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing.*

(b) "General rate case" means a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service. [Emphasis added.]

We first note that MCAAA provides little in the way of analysis in support of its contention that MichCon was required under MCL 460.6a to provide separate notice to its service area of the proposed request for a temporary order for a GCR factor increase from $5.36 to $6.15 per Mcf and to begin a separate hearing. MCAAA also does not provide any real discussion of its argument that MichCon's later increase required yet another separate notice and hearing. It instead simply cites the statutory language and argues that the PSC's actions were unlawful. A party may not announce an assertion of error and then leave it to the courts to discover and rationalize the basis of the claim of error. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, we need not address the issue. *Id*. Nevertheless, in reviewing the merits of the claim, we find no basis for reversal.

MCAAA's challenge centers around the actions of the voters and the Legislature. In response to the energy crisis of the 1970s, the Legislature enacted 1972 PA 300, which allowed utility companies to unilaterally adjust the cost of fuel to customers without having to wait for general rate hearings before the PSC. This created a backlash among consumer groups that culminated in 1982 with the passage of two separate proposals, D and H, to get rid of the automatic adjustment clauses. See *In re Proposals D & H*, 417 Mich 409, 416-417; 339 NW2d 848 (1983). Proposal H, which was found to have "prevailed over" proposal D by our Supreme Court, *id*. at 425, was enacted into MCL 460.6a. *Id*. at 417; *Attorney General v Public Service Comm*, 161 Mich App 506, 512; 411 NW2d 469 (1987).

This Court has previously discussed the practical effect of the notice provisions of MCL 460.6a. In two cases, this Court discussed whether MCL 460.6a would bar the collection of surcharges by Consumers Power and Detroit Edison pursuant to their "Other Operations and Maintenance (O & M) Expense Indexing Systems." Under the system, the utility could impose a surcharge each year on customers' bills equal to the percentage change in the National Consumer Price Index (CPI) occurring during the twelve-month period ending the preceding August. A full and complete hearing was held prior to the issuance of the order originally establishing the system in 1978. In each subsequent year, limited hearings were held for the commission to determine the degree of change in the CPI and to apply the CPI adjustment factor to the indexing system formula to arrive at the surcharge adjustment. *Attorney General v Public Service Comm*, 157 Mich App 198, 201, 204-205; 403 NW2d 467 (1986); *Attorney General v Public Service Comm #1*, 133 Mich App 719, 721-722; 349 NW2d 539 (1984). The Attorney General argued that the system was improper because a full rate hearing was not held before implementation of the CPI adjustment factor each year. This Court disagreed. It determined that the PSC could issue valid annual orders allowing rate increases based on the change in the CPI without holding a full and complete hearing each year "when the single-factor hearing was anticipated and provided for in the principal rate case and order." *Attorney General v Public Service Comm #1*, *supra*, 133 Mich App at 727. In a subsequent challenge that the procedure violated Proposal H, this Court again disagreed. "Proposal H addressed the subject of automatic adjustment clauses and did not abolish or bar use of nonautomatic adjustment clauses operating after notice and hearing." *Attorney General v Public Service Comm*, *supra*, 157 Mich App at 204-205. The Court held that the system, which was established in a full and complete hearing and was then periodically implemented, did not violate the notice provision in MCL 460.6a. *Id*. at 205.

This Court has also previously held that MCL 460.6h(9), which allows the utility companies to self-implement rate increases while awaiting the outcome of the rate plan decision,

was not in conflict with the notice provisions of MCL 460.6a despite the fact that the rate increase that occurs as a result of self-implementation can happen before the hearing is completed. *Attorney General v Public Service Comm, supra*, 161 Mich App at 513-514. This Court stated, "[I]n essence, all Proposal H requires is a full and complete hearing…." *Id*. at 514. Because both sections require a full and complete hearing, no conflict existed.

We find that this Court's previous decisions undercut MCAAA's arguments. The instant case, like the situation involving the O & M system above, involves a two-step process. The PSC did hold a complete hearing after providing notice to MichCon's service area about MichCon's GCR plan, which included the possible implementation of the NYMEX-based contingency matrix. The adopted matrix itself involves specific fixed increases, unlike the matrix initially proposed by MichCon. The matrix could then be periodically implemented in MichCon's contingent information filings, each of which involves notice to the parties in advance of the implementation of the increase. If an interested party believes MichCon has not implemented the appropriate price ceiling, it could petition to reopen the GCR plan, thus providing an avenue for an additional hearing. Moreover, like other self-implementations of GCR factors under MCL 460.6h(9), MichCon's June 14, 2004 contingent information filing and self-implementation of the $6.62 GCR factor did not run afoul of the notice provision in MCL 460.6a simply because it occurred prior to the final order in this case.

In addition, as noted by staff expert Mr. Robert Ozar in his testimony, the matrix is not enacted in perpetuity, as MCAAA seems to suggest. "The NYMEX contingency tariff expires at the end of each GCR annual period and must be re-authorized at the end of each subsequent Commission Plan Order. Act 304 limits Commission approval of contingent GCR factors to twelve months at most."

We also note that other considerations support the PSC's position. MCAAA argued in part below that the initial notice was insufficient to satisfy MCL 460.6a because it might not have put other possible interveners on notice that MichCon would seek such a large GCR factor increase. Thus, intervenors who did not participate might have done so had they known the increases could reach $6.15 per Mcf. Such an argument might have been persuasive if, for example, it could be shown that the initial notice furnished by the PSC did not encompass the later proposed increase to $6.15 per Mcf or the utility's subsequent contingent information filing and GCR increase to $6.62 per Mcf. However, as initially proposed, MichCon's contingency factor mechanism did not have a GCR factor absolute ceiling adjustment to limit the potential increase, unlike the mechanism actually adopted by the PSC. Thus, we hold that the PSC's initial notice provided service customers with adequate notice of the actual rate increases that transpired over the course of the plan year.

MCAAA's argument also fails to take into account the more specific provisions of MCL 460.6h, particularly MCL 460.6h(6), which gives the PSC the authority to amend a proposed rate plan after it reviews all of the information presented to it. If, for example, MichCon had initially simply asked for a GCR factor of $5.36 per Mcf, but the PSC ultimately determined after a rate hearing that a GCR factor of $6.15 per Mcf was appropriate, MCL 460.6h(6) allows the PSC to amend the proposed gas cost recovery plan accordingly. Under MCAAA's reading of MCL 460.6a(1), however, this would require additional notice in MichCon's service area, because this

is a "separate" rate increase. Such an interpretation of the minimal requirements of the MCL 460.6a notice provision is untenable.

For these reasons, the PSC's allowance of MichCon's supplemental request for a GCR factor increase, and its authorization of subsequent abbreviated notice before implementation of the contingency factor matrix were not improper under MCL 460.6a.

III. Authorization of the PSC's actions under MCL 460.6h.

In a blanket attack on the PSC's actions, MCAAA maintains that the actions are not authorized under the "plain language" of various provisions of MCL 460.6h. MCAAA contends that MichCon's original (and only) plan in this case sought a rate increase of $5.36 per Mcf. It then uses this to support its arguments that MichCon's later request for a temporary order seeking an increase to $6.15 per Mcf and the PSC's decision to allow MichCon to implement the NYMEX-based contingency matrix were both improper under various provisions of the statute.

A. Application of MCL 460.6h(10)

During the proceedings below, MCAAA argued that MichCon was required to pursue a new contested case hearing when it offered new evidence and testimony on March 30, 2004 to support its motion for a temporary order for a GCR factor of $6.15. It now argues that this failure renders the implementation of this GCR factor improper. We disagree.

MCL 460.6h(10) provides:

> Not less than 3 months before the beginning of the third quarter of the 12-month period, the utility may file a revised gas cost recovery plan which shall cover the remainder of the 12-month period. Upon receipt of the revised gas cost recovery plan, the commission shall reopen the gas supply and cost review. In addition, the commission may reopen the gas supply and cost review on its own motion or on the showing of good cause by any party if at least 6 months have elapsed since the utility submitted its complete filing and if there are at least 60 days remaining in the 12-month period under consideration. A reopened gas supply and cost review shall be conducted as a contested case pursuant to chapter 4 of Act No. 306 of the Public Acts of 1969, and in accordance with subsections (3), (6), (8), and (9).

Although not discussed by the parties, we note that administrative rule R 460.17401 appears designed to effectuate this statutory provision. It provides:

> (1) A proceeding may be reopened for the purpose of receiving further evidence when a reopening is necessary for the development of a full and complete record or there has been a change in conditions of fact or law such that the public interest requires the reopening of the proceeding.
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> (2) After providing due notice and an opportunity for the parties to be heard, the presiding officer, upon his or her own motion or upon motion of any party, may reopen the proceeding at any time before the date for the filing of

> exceptions to a proposal for decision or, if provided for, replies to exceptions. After the date for filing exceptions or replies to exceptions and until the expiration of the statutory time period for filing a petition for rehearing, the commission may reopen a proceeding upon its own motion or motion of any party.
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> (3) Within 21 days after service of a motion to reopen a proceeding, any party may file an answer. Any party failing to do so shall be considered to have waived objection to the granting of the motion. As soon as practicable after the time for filing answers to a motion to reopen, the presiding officer or the commission shall, in writing, grant or deny the motion. The presiding officer or the commission may provide for hearing and oral argument on a motion to reopen.

MCAAA's reliance on MCL 460.6h(10) is misplaced under the circumstances of this case. After reviewing the above language, we agree with the ALJ and the PSC that there is simply no need to "reopen" proofs that have not yet been closed. MCL 460.6h(10) is a permissive provision that allows for the filing of a revised GCR plan in certain circumstances. The repeated use of the word "reopen" in the language of the statute indicates that the Legislature intended to formulate a method by which parties could offer additional evidence after the formal close of proofs, when this became necessary. The procedure outlined in R 460.17401 is designed to effectuate this provision. This would necessarily mean that the record in the plan case must be closed before MCL 460.6h(10) becomes applicable. This did not occur here. At the time MichCon filed its motion and the new evidence, the parties had submitted their initial testimony and exhibits. However, the cross-examination occurred during the April 29, 2004 hearing, and the exhibits were only received into evidence at that hearing. Had MichCon sought to later introduce new evidence, MCL 406.6h(10) would arguably have applied at that point. Under the circumstances, we defer to the position of the PSC because it is a reasonable construction of the procedure in this regulatory scheme that the PSC is empowered to administer, and does not clearly contradict the language of MCL 46.6h(10). *Attorney General, supra*, 269 Mich App at 479-480.

B. Application of MCL 460.6h(3), (8) and (9).

MCAAA first raises a one-sentence argument that the use of a contingency matrix in MichCon's filing rendered it defective because it did not request a "specific gas cost recovery factor" for "each of those 12 months" in the plan period as required in MCL 460.6h(3).[3]

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[3] MCL 460.6h(3) provides:

> In order to implement the gas cost recovery clause established pursuant to subsection (2), a utility annually shall file, pursuant to procedures established by the commission, if any, a complete gas cost recovery plan describing the expected sources and volumes of its gas supply and changes in the cost of gas anticipated

(continued…)

However, MCAAA fails to provide any further discussion of this issue, including the PSC's longstanding practice with respect to this provision,[4] or why MichCon's initial request for a specific, albeit base, GCR factor of $5.36 per Mcf and later request for a specific GCR factor of $6.15 per Mcf would not satisfy the requirement. Again, a party may not announce an assertion of error and then leave it to the courts to discover and rationalize the basis of the claim of error. *Wilson, supra*, 457 Mich at 243. Accordingly, we could decline to address this issue. *Id*.

Nevertheless, we would find that MCAAA has failed to meet its burden that the PSC unreasonably determined that MichCon's filing was not defective under MCL 460.6h(3). Although the statute is couched in language requiring that a utility set out a request for 12 GCR factors, it does not strictly specify that those factors must be different from each other. Given the longstanding PSC interpretation of this requirement, it is entitled to considerable deference.

MCAAA also maintains that MichCon violated MCL 406.6h(8)[5] when it failed to grant the other parties a reasonable opportunity for a full and complete hearing prior to the approval of the temporary order in this case. We disagree. As noted above, MCAAA and the other parties

(…continued)

> over a future 12-month period specified by the commission and requesting for each of those 12 months a specific gas cost recovery factor. The plan shall be filed not less than 3 months before the beginning of the 12-month period covered by the plan. The plan shall describe all major contracts and gas supply arrangements entered into by the utility for obtaining gas during the specified 12-month period. The description of the major contracts and arrangements shall include the price of the gas, the duration of the contract or arrangement, and an explanation or description of any other term or provision as required by the commission. The plan shall also include the gas utility's evaluation of the reasonableness and prudence of its decisions to obtain gas in the manner described in the plan, in light of the major alternative gas supplies available to the utility, and an explanation of the legal and regulatory actions taken by the utility to minimize the cost of gas purchased by the utility.

[4] In its order, the PSC stated that it has not required gas companies to request specific separate monthly rates since 1985 due to the fact that the market had become too volatile to allow factors for each of the twelve months of the year to be set in advance.

[5] MCL 460.6h(8) provides:

> The commission, on its own motion or the motion of any party, may make a finding and enter a temporary order granting approval or partial approval of a gas cost recovery plan in a gas supply and cost recovery review, after first having given notice to the parties to the review, and after having afforded to the parties to the review a reasonable opportunity for a full and complete hearing. A temporary order made pursuant to this subsection shall be considered a final order for purposes of judicial review.

received actual notice of MichCon's March 30, 2004 motion for a temporary order and the evidence submitted as part of that order. MCAAA had ample time to respond to the motion, and did so with its own motion for a declaratory ruling. MCAAA fully participated in the April 29, 2004 hearing. In addition, as discussed, *supra*, the initial notice and filings placed MCAAA and the other parties on sufficient notice that the final GCR factor could be well above $5.36 per Mcf. MCAAA cannot show that the PSC's actions violated MCL 460.6h(8)'s notice provision.

MCAAA also argues MCL 460.6h(9)[6] prevents the PSC from issuing a temporary order unless it does so within 3 months of the submission of the gas cost recovery plan, or within the beginning of the period covered in the plan. However, we agree with the PSC that the language of this section does not contain a limitation on when the PSC must issue a temporary order, should it choose to do so. As discussed *supra*, this provision is plainly designed to allow the utility to self-implement its GCR factor either after the PSC issues an order allowing it to do so, or before it receives permission from the PSC if that permission is not forthcoming within a reasonable time after filing the gas cost recovery plan. Contrary to MCAAA's contention, it also contains no limitation on self-implementation, other than that it cannot occur before the start of the plan year, or after a three-month waiting period, whichever occurs last.

MCAAA also appears to argue that MCL 460.6h(8) and (9) do not authorize MichCon's actions in this case in moving twice for temporary orders. This claim is also without merit. Neither provision contains a limitation on the number of motions that may be made. As noted by the PSC, the language of MCL 460.6h(8) contemplates that multiple motions might be filed for a temporary order by different parties in the case or by the PSC itself.

C. Authority under MCL 460.6h(6)

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[6] MCL 460.6h(9) provides:

> If the commission has made a final or temporary order in a gas supply and cost review, the utility may each month incorporate in its rates for the period covered by the order any amounts up to the gas cost recovery factors permitted in that order. If the commission has not made a final or temporary order within 3 months of the submission of a complete gas cost recovery plan, or by the beginning of the period covered in the plan, whichever comes later, or if a temporary order has expired without being extended or replaced, then pending an order which determines the gas cost recovery factors, a gas utility may each month adjust its rates to incorporate all or a part of the gas cost recovery factors requested in its plan. Any amounts collected under the gas cost recovery factors before the commission makes its final order shall be subject to prompt refund with interest to the extent that the total amounts collected exceed the total amounts determined in the commission's final order to be reasonable and prudent for the same period of time.

MCAAA also argues that inclusion of a NYMEX-based matrix is not authorized under MCL 460.6h(6) because the market index is not a "future event" under that statutory section. MCAAA maintains that the Legislature could have specifically incorporated the use of an NYMEX index into the language of MCL 460.6h(6) if it had wanted the PSC to use the index as a means of setting the GCR rate factors. Because the Legislature did not do so, MCAAA asserts, the use of this index was not authorized. We disagree with these arguments.

MCL 460.6h(6) provides:

> In its final order in a gas supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the gas cost recovery plan filed by the gas utility pursuant to subsection (3), and shall approve, disapprove, or amend the gas cost recovery plan accordingly. In evaluating the decisions underlying the gas cost recovery plan, the commission shall consider the volume, cost, and reliability of the major alternative gas supplies available to the utility; the cost of alternative fuels available to some or all of the utility's customers; the availability of gas in storage; the ability of the utility to reduce or to eliminate any sales to out-of-state customers; whether the utility has taken all appropriate legal and regulatory actions to minimize the cost of purchased gas; and other relevant factors. The commission shall approve, reject, or amend the 12 monthly gas cost recovery factors requested by the utility in its gas cost recovery plan. *The factors ordered shall be described in fixed dollar amounts per unit of gas, but may include specific amounts contingent on future events*, including proceedings of the federal energy regulatory commission or its successor agency [Emphasis added.]

In the instant case, the PSC agreed with the ALJ that the use of the Staff's version of the NYMEX-based contingency matrix was proper under MCL 460.6h(6) because, unlike MichCon's initial proposal,[7] the Staff's matrix set forth a set of specific factors to be authorized for use in the event that NYMEX prices rise by a certain amount in any particular quarter. In support of its holding, the PSC cited *Attorney General v Public Service Comm*, 215 Mich App 356; 546 NW2d 266 (1996) (upholding the PSC's authority to allow a utility to include gains and losses it might incur from hedging in gas futures market in its gas cost recovery factors).

This determination was supported by witness testimony. Testimony by Robert Ozar explained how the need for the matrix arose, how earlier utility proposals could not satisfy the requirements of MCL 460.6h(6), and the difference between them and one that would satisfy these requirements:

> Toward the end of the 1990's, natural gas price volatility had increased to the extent that utilities were experiencing difficulty in estimating its cost of gas in

[7] MichCon's initial proposal simply applied an across-the-board adjustment equal to 80% of the increase in NYMEX prices.

> its GCR Plan filings. It seemed reasonable that each utility should base its GCR factors on the NYMEX futures strip at the time of the filing, rather than a unique price forecast developed in-house. This standardized approach eliminated much of the time and energy expended in the hearing process that was used to debate the merits of individual utility price forecasts. However, the gas futures price strips were fluctuating considerably more than in prior years, and short of continual updates of requested GCR factors, the standardized use of NYMEX price strips in Plan filings removed the only other means by which utilities could deal with price volatility, that is by building into their price forecasts a nominal buffer, e.g., a little fat, as an integral component of their forecasts. So as to more realistically reflect price uncertainty, an attempt to raise the GCR factor by an arbitrary, though significant amount, followed. Consumers Energy included a proposal, in its 1997 GCR Plan, for adding an explicit $1.00 per Mcf volatility component to its GCR factor. In a similar manner, MichCon in its 1997 GCR Plan requested a $0.57 per Mcf volatility factor. In both cases, the Commission struck down the proposals as being in conflict with [MCL 460.6h(6)], which required a contingent GCR factor to be tied to a specific future event, and implemented only upon the realization of such future event. MichCon, in its 1998 GCR Plan, U-11455, proposed a NYMEX contingency mechanism. In its April 14, 1998 Order in Case U-11455, the Commission rejected the form of MichCon's proposal, stating that: "MichCon has proposed a methodology for calculating updated GCR factors based upon changes in NYMEX prices, but Act 304 requires that specific amounts be designated rather than a methodology." The Commission crafted an alternate approach in its order. Importantly, the contingent factor calculation was not based on what is defined mathematically as a continuous functional relationship, but rather a discrete step function, i.e., a discrete contingent factor for each 10 cent increase in NYMEX future prices.

When asked how the Staff's proposed matrix in this case differed from an (improper) rate adjustment mechanism, Ozar testified:

> A mechanism requires a computation to quantify the GCR factor. Staff's tariff contains a limited number of contingent factors, stated in fixed dollar amounts. The only calculation that is necessary is that required to determine which specific future NYMEX event occurred. Given a specific NYMEX future event, the contingent rate is calculated, fixed, and approved in the Commission's Plan Order.

After reviewing this testimony, we agree with the PSC's determination that the use of this contingency matrix satisfies the requirements of MCL 460.6h(6). The "base" GCR factor is a "fixed dollar amount per unit of gas," as is the increased GCR factor. As noted *supra*, the adopted matrix itself involves specific fixed increases, unlike the matrix initially proposed by MichCon. Contrary to MCAAA's argument, this increase is a "specific amount contingent on future events." MCAAA's objection that the NYMEX index itself is not a "future event" is arguably correct. However, a volatile or unpredictable rise in the price of gas, as reflected by the NYMEX index, is a future event. This future event triggers a specific GCR factor increase. In addition, the matrix is not enacted in perpetuity but covers only one annual period at a time, and

thus fits within the premise that the "future event" must occur during the 12-month GCR Plan year.

We likewise find unpersuasive MCAAA's argument that, because the Legislature did not specifically incorporate the use of an NYMEX index into the language of MCL 460.6h(6), it did not intend to allow the use of the NYMEX index as a factor in setting GCR rates. The PSC is given broad discretionary power to set rates. See *General Motors Corp v PSC No 2*, 175 Mich App 584, 588; 438 NW2d 616 (1988). It would seem unnecessary, and somewhat unproductive, for the Legislature to try to anticipate and list all of the contingencies that could have a bearing on determining a proper GCR factor.

In summary, given the deference afforded to PSC decisions, we hold that MCAAA has failed to show that the PSC's actions were unauthorized under MCL 460.6h.

IV. Reasonableness of the PSC's actions.

MCAAA also argues that the utilization of a NYMEX-based adjustment clause is unreasonable and is irrationally inconsistent with the legislative goals of establishing a "reasonableness and prudence" standard applicable to a utility's energy acquisition policies and practices.

We disagree with MCAAA's contention that the PSC's decision is inconsistent with the legislative intent and goals of Act 304. In its analysis, the PSC discussed why inclusion of a NYMEX-based contingency matrix was necessary and prudent. It noted that the price of gas over the applicable period was so volatile and had risen so high that, despite the temporary order, MichCon was still not able to fully recover the cost of its gas. It also discussed how this procedure furthered its goals of evening out customers' rates as much as possible while dealing with market volatility:

> The price may change from month to month, or even hour to hour, but the customer needs more stability and predictability. The Commission seeks to even out customers' rates as much as possible while prudently dealing with the all-too-real volatility of the market. The Commission seeks thereby to prevent the customer from experiencing a price hike in the next year out, that is actually meant to pay for gas consumed the prior year, and that includes paying interest to the utility on the revenue that could not be realized during the year that the gas was supplied to the customer. The maximum amount of stability and predictability, which also allows for the customer to be paying the real price (or as close to the real price as possible) for the gas at the time that the customer is consuming it, is what the Commission strives for. This goal precipitates each refinement in the Commission's interpretation of Act 304.

This Court has previously recognized the importance of the goal of reliably charging utility customers the price they pay for gas as close as possible to the time that gas is consumed. *Attorney General v PSC*, 235 Mich App 308, 315-316 (Sawyer, J), 318 (Markman, J. concurring); 597 NW2d 264 (1999). The PSC's analysis and conclusion in the instant case was supported by witness testimony. MichCon witness Robert Lawshe provided an overview of

MichCon's supply plan and explained how the NYMEX prices were tied to acquisition of MichCon's gas purchases. In his updated testimony, he also explained how NYMEX prices had risen sharply and why they were expected to remain higher than initially predicted. MichCon witness Kenneth Slater testified that the company had projected a $180 million underrecovery by the conclusion of the plan year if it did not increase the GCR factor. MichCon witness Jennifer Schmidt explained how the contingent factor matrix proposed by MichCon would account for the volatility of the percentage of gas MichCon purchased on the spot market, and how the NYMEX prices would be reflected in the GCR factor increases. Ms. Schmidt also explained that MichCon had no incentive to overrecover because it would then have to return the excess, with interest. As noted above, Robert Ozar explained how the need for the matrix arose, how earlier utility proposals could not satisfy the requirements of MCL 460.6h(6), and how the Staff's proposed matrix was reasonable. Even though MCAAA's witness presented contrary testimony, the PSC was not required to adopt his position and was permitted to approve the contingent factors based on the supporting testimony of MichCon and PSC Staff witnesses.

We further find that MCAAA's alternate arguments that the NYMEX-based clause is aimed at maximizing, not minimizing, rate collections are speculative and unsupported. As noted by the PSC, the utility has no incentive to overrecover. More importantly, however, MCAAA did not submit evidence to dispute the reasonableness of MichCon's utility market forecast, operational plan, gas purchasing strategy, or its five-year forecast. This severely undercuts MCAAA's underlying arguments that MichCon's gas purchasing strategy, with its plan to purchase approximately 85% of its gas at prices subject to NYMEX gas prices or indexed to the price of gas on the spot market, was somehow defective. It also substantially weakens MCAAA's claim that NYMEX prices have no necessary relationship whatsoever with MichCon's purchases or operational choices. Given its position below, MCAAA cannot now take a contrary position on appeal and claim that the institution of some form of contingency matrix is part of a flawed cost minimization strategy, or a more sinister attempt to maximize gas rates. See *Living Alternatives for the Developmentally Disabled v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994).

In summary, MCAAA has not shown that the PSC's decision to allow MichCon to base its GCR factors in part on a NYMEX-based contingency matrix was generally unreasonable, arbitrary or capricious.

V. The PSC's adjustment clause is "unnecessary."

MCAAA next argues that the PSC's utilization of a NYMEX-based adjustment clause is unnecessary given the PSC's ability to alter an ongoing GCR plan pursuant to MCL 460.6h(10). We disagree.

That the re-opener provisions in MCL 460.6h(10) might be unnecessary in certain cases with the adoption of a NYMEX-based index does not render MCL 460.6h(10) a "total nullity" as MCAAA argues. It might, admittedly, render it more unlikely that a plan may be reopened because the index is actually a more accurate measure of actual gas costs throughout the plan period. However, MCAAA's argument assumes that GCR factors are based solely on NYMEX pricing, and that the utility would not need to revisit other portions of its GCR plan. This is not

the case. Even with the NYMEX contingency matrix, a utility or the commission may still desire to reopen a closed gas cost recovery plan proceeding to address other contingencies.

We likewise find unpersuasive MCAAA's related argument that the fact that MichCon could simply use the reconciliation process to recoup any underrecovery indicates a clear legislative intention against allowing the inclusion of a NYMEX-based matrix in a rate plan. Were this the case, MCL 460.6h(10) itself would not be necessary. The reconciliation process arguably could make MichCon whole should it underestimate the proper GCR factor. However, the existence of a reconciliation process does not obviate the need for accurate and timely gas cost recovery estimating. As noted by the PSC, utilities have no incentive to artificially raise GCR factors because they must pay 11.5% interest on any overrecovery. Customers likewise are best served when an underrecovery is minimized because they must pay interest to the utility on the amount of any underrecovery. MCL 460.6h(13)-(15). Moreover, MCAAA's argument is actually undercut in that the use of a NYMEX-based index might curtail the need for additional hearings, with their attendant expenses and drain on PSC and party resources. "This Court has recognized that factors such as economic benefits, increased efficiency, and accuracy are relevant in assessing the overall reasonableness of a proposed procedure." *Attorney General v PSC*, *supra*, 235 Mich App at 315-316.

MCAAA has failed to show that the ability of a utility or the PSC to reopen a closed GCR review under MCL 460.6h(10) clearly precludes the utilization of a NYMEX-based contingency matrix. The fact that the re-opener provisions in MCL 460.6h(10) exist to provide a mechanism for revisiting a closed GCR review does not render the PSC's actions in this case unlawful or unreasonable.

VI. Alleged Due Process Violation.

MCAAA lastly argues that, because the PSC's adoption of the automatic NYMEX-based clause violated the statutory notice and procedure process due under MCL 460.6a and MCL 460.6h, it therefore also violated the constitutional due process rights of the intervenors, including MCAAA. It contends that PSC's due process violations provide additional grounds to reverse the PSC's orders and to remand this case.

MCAAA raised general due process concerns in passing in its initial brief and in its exceptions to the ALJ's proposal for decision. However, it presented no specific argument or legal support for its position that the PSC actions violated due process. Nor did the PSC specifically discuss the merits of this issue. We thus find that appellant has failed to preserve this issue for review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). This Court reviews unpreserved claims of constitutional error for outcome-determinative plain error. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996).

Both the state and federal constitutions provide that private property shall not be taken without due process of law or just compensation. US Const, Am V; Const 1963, art 1, § 17 and art 10, § 2. "Due process is violated only when legislation impairs vested rights." *Attorney General v PSC*, 249 Mich App 424, 435; 642 NW2d 691 (2002), citing *Taxpayers United for Michigan Constitution, Inc v Detroit*, 196 Mich App 463, 467-468; 493 NW2d 463 (1992). To show that one has property rights subject to due process, an individual must show that he has a

"legitimate claim of entitlement" to the property as opposed to an abstract need or desire for it or a unilateral expectation of it. *Attorney General v PSC, supra*, 249 Mich App at 436; *Bundo v Walled Lake*, 395 Mich 679, 692; 238 NW2d 154 (1976), quoting *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972).

Here, MCAAA cannot show that case law clearly supports its premise that ratepayers have a protected property right in the setting of utility rates. MCAAA's cited cases do not support its position. In *Michigan Consolidated Gas Co v PSC*, 389 Mich 624, 633, 640; 209 NW2d 210 (1973), our Supreme Court affirmed the lower court's grant of a preliminary injunction that was designed to ensure that the utility's rates were not so low that they were unconstitutionally confiscatory. That case concerned the utility's rights to protection from confiscatory rates, not a ratepayer's right to due process. *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950), involved the sufficiency of the process that was given in that case when the recipients had a vested right in trust property. *Building Owners & Managers Ass'n v PSC*, 424 Mich 494, 501-502; 383 NW2d 72 (1986), which did involve the sufficiency of notice given about a rate increase, reached no decision regarding whether the public has a constitutional right to notice of PSC rate increases or to participation in rate hearings.

In contrast, in *Attorney General v PSC, supra*, 249 Mich App at 433-437, this Court discussed the appellants' argument that the PSC's dismissal of pending power supply cost recovery (PSCR) proceedings illegally cut off Detroit Edison's customers' rights to refunds related to PSCR over-recoveries and certain cost disallowances. This Court found that any refund is purely speculative, at least until the PSC issues a final order mandating a refund of specific amounts, and thus that the appellants had failed to establish a vested property right to get a refund. *Id*. at 437. See also *Fun 'N Sun RV, Inc v Michigan*, 447 Mich 765, 788-789; 527 NW2d 468 (1994) (no vested right of policyholders to surplus that might have accumulated in state Accident Fund). We find the right to a specific GCR factor analogous to the right to a rate refund. In addition, just as a utility company does not have a vested property right in charging a particular rate, see *Verizon North, Inc v PSC*, 260 Mich App 432, 440; 677 NW2d 918 (2004), it would seem that conversely a customer does not have a vested right to pay any particular rate.

In any event, even were we to find that ratepayers do have a property interest subject to protection; MCAAA has not plainly shown that the PSC's actions violated any right of due process. "Due process in civil cases generally requires notice of the nature of the proceedings [and] an opportunity to be heard." *Hanlon v Civil Service Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002) (citations omitted). Notice must be reasonably calculated to apprise any interested parties "of the pendency of the action and must afford them an opportunity to present objections." *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 574; 692 NW2d 68 (2004). At the least, the procedures used here gave MCAAA and the other ratepayers notice of the possible GCR factor increase and an opportunity to participate in the proceedings. While

MCAAA would prefer the imposition of additional requirements, it cannot show that the PSC did not meet this minimum standard. We thus find MCAAA's due process claim without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter